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No. 95-1598

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

LEROY L. YOUNG and
ATTORNEY GENERAL OF OKLAHOMA,

Petitioners,

v.

ERNEST EUGENE HARPER,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

BRIEF OF AMICI CURIAE STATES OF NEVADA, CALIFORNIA, COLORADO, HAWAII, IDAHO, MONTANA, NEW YORK IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Preparole Conditional Supervision Program enacted pursuant to Okla. Stat. tit. 57, § 365 (Supp. 1990) is more similar to parole or minimum security imprisonment; and, thus, whether continued participation in such program is protected by the Due Process Clause of the Fourteenth Amendment.

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INTEREST OF THE AMICI CURIAE

This brief filed in support of the position asserted by the Petitioners, is submitted on behalf of the State of Nevada and other signature States (the "Amici States") through their Attorneys

General pursuant to Supreme Court Rule 37.4. The Amici States have an important interest in this case because they all operate correctional facilities in which overcrowding is or will soon be a significant issue. Thus, programs similar to Oklahoma's Preparole Conditional Supervision Program, in which inmates are allowed to reside within the community, either have been or are being enacted by the Amici States' Legislatures in an effort to eliminate excessive overcrowding within such correctional facilities.

The Court of Appeals for the Tenth Circuit held that any inmate placed on a program which allows the inmate to reside outside of a correctional facility on a full-time basis, has a liberty interest in remaining on such program. Accordingly, the Court of Appeals held that an inmate placed on a prisoner release program is entitled to the procedural protections in Morrissey v. Brewer, 408 U.S. 471 (1972) before transfer from such program. Harper v. Young, 64 F.3d 563 (10th Cir. 1995).

The State of Nevada has a residential confinement program wherein an inmate is allowed to reside outside a correctional facility. Section 5 of Nev. Rev. Stat. § 209.392 (1995) specifically states that the assignment of an inmate to such program is "[a] continuation of his imprisonment and not a release on parole" and "[f]or the purposes of NRS 209.341 [classification], an assignment to a facility of the department of prisons..." This program was enacted and is essential to assist in the alleviation of overcrowding in Nevada's correctional facilities.

The impact of being compelled to comply with the decision of the Court of Appeals would be severe on all the Amici States. A determination that a liberty interest is created by such a classification system would cause many of the Amici States to eliminate such programs due to the burden of providing a hearing pursuant to Morrissey v. Brewer merely for classification of an inmate. In addition, such a determination would discourage states

from experimenting with new procedures or programs utilized to eliminate the overcrowding dilemma. The determination of the Court of Appeals threatens to impose an enormous financial burden on the Amici States and restrict the ability of prison administrators to manage their correctional facilities. Accordingly, the Amici States submit this brief to assist the Court in the resolution of this case.

SUMMARY OF THE ARGUMENT

Due to the rapid growth of prison populations and due to financial inability to construct new correctional facilities quickly enough to accomodate the increase in inmates, many state legislatures have been forced to enact programs which allow inmates to serve a portion of their term of incarceration in a residential program. The purpose of such programs is to remedy the dilemma of overcrowding, but retain custody and control of the inmate just as if the inmate remained within the four walls of a correctional facility.

Although an inmate upon imprisonment is not wholly stripped of constitutional protections, many rights and privileges for lawfully incarcerated inmates are limited or withdrawn. Bell v. Wolfish, 441 U.S. 520, 545-546 (1979); Wolff v. McDonnell, 418 U.S. 539, 555 (1974). The withdrawal of such rights is justified by the considerations underlying our penal system. Bell, at 545-546.

One such current consideration is the problem of overcrowding. Residential confinement programs have been enacted by state legislatures to assist in the elimination of this problem, while at the same time, achieving the goals of the penal function in the criminal justice system, being:

> ...to punish justly, to deter future crime, and to return imprisoned persons to society with an improved chance of being useful, law-abiding citizens.

Rhodes v. Chapman, 452 U.S. 337, 352 (1981).

In order to reduce the problem of overcrowding and to maintain security and proper living conditions within correctional facilities, another classification level was created. This classification level allows an inmate to reside outside a correctional facility, but remain within the custody of prison officials. Nev. Rev. Stat. § 209.392 (1995), specifically provides that an inmate placed into the residential confinement program does not acquire a liberty interest when classified into the program. Likewise, in all similar programs, including the Oklahoma program under review by this Court, the nature of the program is merely a classification level. It is not by statute or by any other mechanism treated as parole by the states or their prison authorities. Accordingly, an inmate does not obtain a liberty interest in continued placement at such level. Meachum v. Fano, 427 U.S. 215 (1976).

ARGUMENT

PROPOSITION I

AN INMATE DOES NOT ACQUIRE A LIBERTY INTEREST BY PLACEMENT ON A CLASSIFICATION LEVEL WHICH ALLOWS SUCH INMATE TO RESIDE OUTSIDE A CORRECTIONAL FACILITY.

In Meachum v. Fano, 427 U.S. 215 (1976), this Court held that the Due Process Clause does not in and of itself protect

an inmate against transfer from one institution to another within the state system. This Court specifically stated:

> ...given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and subject him to the rules of its prisons system so long as the conditions of confinement do not otherwise violate the Constitution.

Id, 427 U.S. at 224. Due to the overcrowding dilemma which has arisen throughout our nation, many states, including Oklahoma, have chosen to create new classification levels within the states' penal systems.

One new classification level, which is called by many names, including but not limited to Preparole Conditional Supervision and Residential Confinement, allows an inmate to be transferred to a security level wherein the inmate resides within the community.[1] The decision of whether to classify the inmate into such a program is a matter of discretion within the Department of Prisons just as any decision regarding classification of an inmate. Accordingly, as stated by this Court in Meachum, to hold that the transfer or classification of an inmate from a residential program to another security level invokes the procedural protections of the Due Process Clause

> ... would subject to judicial review a wide spectrum of discretionary actions that traditionally

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[1]Many other classification levels have been enacted, including house arrest, electric home monitoring, work/study release, furloughs, half-way houses and community correctional centers.

> have been the business of prison administrators rather than of the federal courts.

Id., 427 U.S. at 225. See also Bell v. Wolfish, 441 U.S. 520, 548 (1979) (operation of correctional facilities is the province of the Legislative and Executive branches of government and not the Judicial); McCord v. Maggio, 910 F.2d 1248, 1250 (5th Cir. 1990) (classification of prisoners is within the discretion of prison officials).

Management of the local prison system is of "acute interest to the States". Meachum v. Fano, 427 U.S. at 229. State legislatures have found this classification level necessary to provide the proper living conditions and maintain security within the correctional facilities. Prison officials must be provided deference in the application of such programs. Bell v. Wolfish, 441 U.S. at 547.

The decision of the Tenth Circuit ignores the true nature of a residential confinement program. In reviewing certain of the Amici State's programs, including Nevada,[2] California[3] and Colorado,[4] as well as the Oklahoma program,[5] it is clear that the nature of each system is merely a classification level enacted to assist in the elimination of the overcrowding crisis.[6] Thus,

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[2]Nev. Rev. Stat. § 209.392 (1995).

[3]Cal. Penal Code § 8051, et seq. (West Supp. 1996).

[4]Colo. Rev. Stat. § 17-27.5-102 (1986).

[5]Okla. Stat. tit. 57, § 365 (Supp.1990).

[6]See Asherman v. Meachum, 566 A.2d 663, 668 (Conn. (continued...)

essentially, assignment to a residential confinement program is no different from assignment to any other facility or program, such as to a forestry camp, fire crew, maintenance crew or boot camp. An inmate assigned to such a program remains obligated to serve out the remainder of his sentenced term of incarceration, either within the confines of a correctional facility or within the restrictions of such program.

Unlike parole, an inmate on a residential confinement program is not "entitled to retain his liberty as long as he substantially abides by the conditions" of such a program. Morrissey v. Brewer, 408 U.S. 471, 479 (1972). Instead, an inmate can be reclassified at the discretion of prison authorities for any reason or for no reason. Accordingly, it is clear that this Court's holding in Meachum v. Fano, that an inmate holds no liberty interest in his place or degree of confinement, is controlling in this matter.

A prison transfer is not a decision which implicates the procedural protections of the Due Process Clause of the Fourteenth Amendment. Meachum v. Fano, 427 U.S. 215 (1976); Montanye v. Haymes, 427 U.S. 236 (1976). As this Court stated:

> The initial decision to assign the convict to a particular institution is not subject to audit under the Due Process Clause, although the degree of confinement in one prison may be quite different from that in another. The conviction has sufficiently extinguished the defendants' liberty

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[6](...continued)
1989), wherein the Supreme Court of Connecticut held that an inmate does not have a liberty interest in remaining on home release status. The Connecticut legislature has since repealed the home release statute.

> interest to empower the State to confine him in any of its prisons.
>
> Neither, in our view, does the Due Process Clause in and of itself protect a duly convicted prisoner against transfer from one institution to another within the state prison system. Confinement in any of the State's institutions is within the normal limits or range of custody which the conviction has authorized the State to impose.

Meachum, 427 U.S. at 224-225. An inmate transferred to a residential program does not have a constitutionally protected liberty interest in remaining at that classification level.

PROPOSITION II

THE TENTH CIRCUIT ERRED IN FINDING THAT THE PROCEDURAL PROTECTIONS OF MORRISSEY V. BREWER WERE WARRANTED.

As shown above, the Tenth Circuit did not examine the true nature of a residential confinement program when it held that a liberty interest was created merely due to transfer from a correctional facility. However, even assuming a liberty interest was created, the liberty interest is not identical to a parolee due to the numerous additional restrictions within a residential confinement program and due to the fact that an inmate in such program can be transferred from the program at the discretion of the prison authorities. Accordingly, the court must address what procedures are applicable to this matter.

This Court has consistently held that requirements imposed by the Due Process Clause are flexible and variable. A

determination of what procedures are required must be decided based upon a review of the particular situation being examined. Wolff v. McDonnell, 418 U.S. 539, 560 (1974); Hewitt v. Helms, 459 U.S. 460, 472 (1983).

As shown in Proposition I, a residential confinement program is merely a classification level in which an inmate may be placed or removed at the discretion of prison authorities. Thus, assuming any liberty interest is created upon placement at that classification level, a detailed adversary proceeding as mandated in Morrissey would not be necessary as the discretionary decision of whether to transfer an inmate would not be materially assisted by such a procedure. See Hewitt, 459 U.S. at 473-474.

In the instant matter, Mr. Harper was transferred from the residential confinement program due to denial of parole. Clearly, there would be no factual issues to be determined in an adversary proceeding. In addition, the determination of whether to transfer Mr. Harper turns largely on "'purely subjective evaluations and on predictions of future behavior'". Id., 459 U.S. at 474 (quoting Connecticut Board of Pardons v. Dumschat, 452 U.S. 458, 464 (1981)). Even though Mr. Harper did not violate the rules of the program, the prison officials may have determined that due to parole denial, Mr. Harper was more likely to flee from justice or that the safety of the community was at greater risk. Thus, as in Hewitt, the balance of such interests would lead to a conclusion that only an informal nonadversary proceeding would be required.

Although it remains the position of the Amici States that an inmate on a residential confinement program does not have a liberty interest in continued placement in such program, assuming a liberty interest has arisen, minimum procedural protections such as those set forth in Hewitt would be sufficient to ensure that an inmate is not arbitrarily transferred to a higher classification.

CONCLUSION

The judgment of the United States Court of Appeals for the Tenth Circuit should be reversed.

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